No. 92-202

IN THE

Supreme Court of the United States

October Term, 1992

RANDOLPH CENTRAL SCHOOL DISTRICT,
Petitioner,

vs.

CORA ALDRICH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was the court of appeals correct in holding that the civil service system for classifying custodians and cleaners in the Randolph Central School District must be bona fide and based upon real job-related distinctions to qualify as a valid "factor other than sex" defense to an Equal Pay Act claim, and thereby to justify a pay differential for substantially equal work at the Randolph Elementary School?

II. Even if bona fide and based upon job-related distinctions on its face, must the civil service classification system used to classify cleaners and custodians at the Randolph Elementary School in the Randolph Central School District also be applied in practice to materially distinguish the job responsibilities of Mrs. Aldrich as a cleaner from those of custodians, if it is to justify a pay differential between these positions and satisfy the "factor other than sex" defense to the Equal Pay Act?

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STATEMENT OF THE CASE

Respondent incorporates by reference the procedural history stated in the petition for a writ of certiorari, adding only that when Cora Aldrich pursued administrative grievance channels available to her, the resulting administrative decisions were made without consultation of either her co-workers or her immediate supervisor. A 192.[1] Petitioner, in its statement of the case, has treated as undisputed facts that remain in dispute. This highlights the fact that granting a writ of certiorari would be premature because of inadequate factual development in the lower courts.

Cora Aldrich began work in the Randolph Central Elementary School ("the School") in February of 1982 as a part-time cleaner, and was hired to work full time later that year. At the time she was first hired, the custodial staff in the building was reduced from three custodians (all men) and a cleaner (a woman) to two custodians (both men) and one and one-half cleaners (both women). Jeffrey Crossley, who is now head custodian, was a custodian prior to the reduction in force and performed the same duties as the female full-time cleaner who succeeded him, and describes his duties as "custodian" from June 1974 through June 1981 as "approximating" those performed by Cora Aldrich in 1984 under the classification and pay scale of "cleaner." A 189-190, 230 & 234. Although in 1976 the Board of Education of the School equalized cleaners' and custodians' pay, it again downgraded the cleaner position before Mrs. Aldrich was hired as a cleaner. A 227 & 190. When Mrs. Aldrich filed a job classification questionnaire with the Cattaraugus County Civil Service Commission, Mr. Louis C. Fulkerson

[1] Citations to "A", followed by a page number, are to the appendix for appellant submitted to Second Circuit.

suggested that she discuss an increase in compensation with the union. This made it clear that, despite the School District's suggestions to the contrary, the District was not foreclosed by civil service requirements from increasing Mrs. Aldrich's pay to adequately compensate her for her performance of duties consistent with those performed by custodians.[2] A 119. Outside of the requirements of the civil service examination, there is nothing to preclude Mrs. Aldrich from being given full recognition as a custodian. Like the cleaner's position, the custodian job description imposes no minimum job qualifications upon persons hired for a custodial position. A 97. To the extent that New York or local civil service requirements *do* "require" the School to violate the Equal Pay Act, this would hardly constitute a *defense* to the Equal Pay Act, but would establish a violation of the Supremacy Clause, which the School would have to remedy by adhering to *federal*, rather than to conflicting state or local law.

Despite her different classification and lower pay scale, Mrs. Aldrich has found that the actual duties that she performs as cleaner are substantially the same as those performed by the custodian on staff, Randy Abbey. Among the non-cleaning tasks which she performs are: extensive painting (*e.g.*, windows, doors, lockers, gym partition), repairing heavy sliding doors, repairing and helping build shelves, performing yard work, maintaining

[2] Although the School relies heavily on the civil service restriction that only civil service examinees scoring in the top three can be hired as custodians, it is by no means clear that the School always has adhered to this requirement when it was sufficiently motivated to do otherwise. For example, the school board minutes for March 3, 1976, Exhibit Pl-R to defendants' depositions, clearly state that Grant Ormond would be appointed as custodian "upon his *passing* the civil service exam" (emphasis added), with no mention of a requirement that he place within the top three as a condition to his appointment. This presents yet another factual issue which is properly left for development at trial.

individual heating units, helping with plumbing and electrical repairs, replacing fluorescent tubes and helping replace ballast in heavy light fixtures while standing on a ladder, patching broken windows, monitoring the boilers and other building systems, and supervising youth employed under the CETA program and Job Training Partnership Act. A 193-194 & 224-228. Although the district court, which petitioner cites at length, appeared to accept petitioner's factual argument that custodial work involved maintenance and repair work of a different character than that expected of cleaners, the court of appeals properly countered that this is a disputed factual issue not properly for determination by the court on a motion for summary judgment. The court of appeals noted further that, although the School cites boiler maintenance and repair, and plumbing repairs as additional skilled duties required of only custodians, Mrs. Aldrich's own supervisor acknowledged that no special training was required for boiler repair and that Mrs. Aldrich herself had performed or assisted with both boiler and plumbing maintenance and repair in her capacity as cleaner. Furthermore, substantial maintenance and repair work is routinely contracted out rather than being performed by School custodians. A 225-226.[3]

[3] Petitioner also misrepresents Judge Pratt's concurring opinion as suggesting that the district court's decision on remand would likely be to accept the School's "factor other than sex" defense. By stating that a finding of lack of job relatedness would be "almost unthinkable," however, Judge Pratt was not effectively finding for the Defendant, but simply was seeking to refocus the majority's argument, stressing, rather than the job-relatedness of the examination and classifications in themselves, the School's application of that classification system to the particular facts of Mrs. Aldrich's case. To the extent that the School ignored the substantive job distinctions intended to accompany different civil service classifications, Judge Pratt reasoned that the system of classification, as applied to Mrs. Aldrich, did not constitute a bona fide and job-related basis for a salary differential, and thus did not provide a legitimate "factor other than sex" defense.

REASONS FOR DENYING THE WRIT

I. The court of appeal's decision was not final, and questions of fact for trial remain that could dispose of the case without the necessity for this Court's review.

Although the Court is not precluded under 28 U.S.C. §1254(1) from exercising its discretion to grant a writ of certiorari with respect to a nonfinal judgment of the court of appeals, it has nevertheless expressed reluctance to do so except in extraordinary cases. As early as 1893, in *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384, this Court stated it "should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), the Court cautioned more generally that the grant of certiorari should "be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. . . . And, except in extraordinary cases, the writ is not issued until final decree." Lack of finality, the Court explained, "of itself alone [may] furnish[ ] sufficient ground for the denial of [an] application [for a writ of certiorari]." In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967), this Court specifically applied this principle where, as here, the court of appeals had "ruled on various legal issues presented to it but remanded to the District Court" for final judgment on the merits, leaving the case "not yet ripe for review" by the Supreme Court.

Here, there is no sufficient basis for an extraordinary exercise of the Court's discretion. No final factual determinations have even been made that will decide the crux of the matter: whether the job performed by Mrs. Aldrich is substantially equal to that of custodians. Thus, it would be premature for this Court to issue what would essentially be an advisory opinion as to the proper standard to be used in asserting an affirmative defense. The lack of finality in this case is particularly weighty in light of the fact that, as we explain below, no clear, serious, or direct conflict exists among the circuits and no important issue of federal law is presented. Even if a conflict among the circuits did exist, it would be more clearly defined once the district court has had the opportunity to apply the Second Circuit's decision and, if it reaches the issue, to more clearly define the level of proof necessary to sustain a "factor other than sex" defense. This Court should not render a legal decision in a factual vacuum.

II. The decision of the Second Circuit does not present a serious or direct conflict with decisions of other federal circuit courts.

While the Second Circuit opinion itself suggests a conflict among the circuits, a closer examination of the cases cited by the court of appeals and by petitioner indicates that these cases are not in direct conflict with the decision of the Second Circuit.

As noted by petitioner, the Second Circuit expressed disagreement with the opinion of the Eighth Circuit in *Strecker v. Grand Forks City Social Services Bd.*, 640 F.2d 96, 100-103 (8th Cir. 1980), adopted *en banc* without opinion, 640 F.2d at 109 (8th Cir. 1981). However, the cases are so factually distinct that they do not conflict on any point of law essential to decision in this case. Despite the Second Circuit's suggestion that the Eighth Circuit abandoned any requirement that the "factor other than sex" be bona fide, rather than pretextual, the Eighth Circuit clearly satisfied itself that the qualifications it was reviewing were both job-related and not pretextual.

Strecker involved a classification system based upon both the job duties and responsibilities of a particular position and the personal qualifications of the person hired to fill that position, thus necessarily requiring consideration of the personal attributes of each applicant in addition to purely objective criteria. In contrast, this case involves a selection system for custodians designed to be based solely upon examination results, rather than upon independent personal qualifications. This classification of custodians according to examination results, to make any sense at all, must be accompanied by a corresponding assignment of distinct job responsibilities which can justify paying the custodians a higher wage than cleaners.

Even the *Strecker* Court, which was considering a classification system which included consideration of personal qualifications as well as objective criteria, did not accept that the mere existence of a classification system would be sufficient to satisfy the "factor other than sex" defense under the Equal Pay Act. *See also Maxwell v. City of Tucson*, 803 F.2d 444 (9th Cir. 1986); *Marshall v. Kent State University*, 589 F.2d 255 (6th Cir. 1978). Instead, it treated "compensation systems that determine salaries on the basis of job duties and responsibilities, educational attainments and experience" to be "clearly permissible under the Equal Pay Act" only where they "are related to the responsibilities and duties that employees must perform in their jobs." *Strecker*, 640 F.2d at 100. Indeed, the Court observed that plaintiff, in contrast to the respondent in this case, had not even argued that the classification system was not related to her job. *Id.* at 103 n. 9. The court also recognized that "educational and experience requirements could be a pretext for sex discrimination," although the plaintiff had introduced no evidence of pretext in the case before it. *Id.* at 101 n. 2. Finally, the *Strecker* court also considered it important that the employer being sued did not, in fact, ultimately determine the classifications being challenged in the case. In contrast, the employer in this case did have this power to raise Mrs. Aldrich's salary to a level comparable to a custodian's pay. Moreover, to the extent classification and resulting pay differentials are in the hands of the local civil service commission, that body is a party to this litigation and has the power to correct any resulting inequities or illegalities in its pay system. The civil service commission had not been named in the *Strecker* litigation. The civil service system and fact situation at issue here are thus highly distinct from those before the court in *Strecker*.

Fallon v. State of Illinois, 882 F.2d 1206, 12311 (7th Cir. 1989), does appear to more clearly state its disagreement with the position that the "factor other than sex" must be "related to the requirements of the particular position in question, or that it is a 'business-related reason[ ].' " *But see E.E.O.C. v. J.C. Penney Co., Inc.*, 843 F.2d 249 (6th Cir. 1988); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982) (requiring "factor other than sex" to serve legitimate business reason). Despite this rhetoric, however, the Court actually used a job-related justification in observing that, although remand was called for in the case before it, wartime veteran status may, in appropriate circumstances, serve as a legitimate "factor other than sex." *Fallon*, 882 F.2d at 1212. The court stated that it "seems eminently reasonable" for the State to believe "that wartime veterans will have a special camaraderie with other veterans, making it more likely that veterans needing the Department's aid will open up to the VSO when they otherwise might not do so." *Id.* Moreover, to the extent that wartime veteran status does not provide an obvious basis for a wage differential, it has traditionally enjoyed particularly favorable treatment by the Courts as a justifiable consideration in hiring determinations, despite differential effects resulting therefrom for men and women. *See Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 69 L.Ed.2d 870 (1979). No such favored status is present in this case.

Furthermore, *Fallon*'s purported rejection of the job-relatedness requirement was not part of a holding. *Fallon* simply cites *Covington v. Southern Illinois University*, 816 F.2d 317, 321, 322 (7th Cir.), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 101 (1987), for that proposition. *Covington*, however, while noting that the

"factor other than sex" need not be "related to the requirements of the particular position in question," did not expressly reject a more general "business-related reasons" test. In fact, it justified the challenged pay differentials before it according to such business-related reasons.

The *Covington* court examined the educational and experimental differences of the male and female teachers being examined, the financial circumstances of the University, and the effects on morale of requiring employees to take cuts in pay when transferring between positions for the same employer. Only using these business rationales did the Court satisfy itself that the differentials were adequately justified under the "factors other than sex" defense. The positions in question were also professional teaching positions, where education and experience are far more broadly recognized as relevant to job qualification and appropriate pay scale than are such considerations in more unskilled jobs such as those at issue in the present case. Such personalized "factors other than sex" are not purported to be factors in the pay differential in the instant case, nor would they likely be appropriate to differentiate between the pay of custodians and cleaners, where neither job, as presently described by the civil service commission, imposes any minimum qualifications. Instead, the civil service classification at issue in this case purports simply to establish a basis for differentiating between *job duties* for custodians and cleaners. In fact, however, the civil service examination has not differentiated duties, but has merely sought to justify differential pay for essentially equal work, and thus has failed to serve its purported function. Unless the system is actually used to require additional duties of custodians or to limit the

duties expected of cleaners, it cannot serve as a bona fide "factor other than sex" justifying differential pay for substantially equal work, even according to the opinions in *Strecker*, *Fallon* and *Covington*.

Even absent a requirement of job- or business-relatedness as an essential element to the "factor other than sex" defense, the classification system must nevertheless serve a bona fide purpose of some kind, *see, e.g., County of Washington v. Gunther*, 452 U.S. 161 (1981), and must "be used and applied in good faith; it was not meant to provide a convenient escape from liability." *Fallon*, 882 F.2d at 1211. *See also Ende v. Board of Regency Universities*, 757 F.2d 176 (7th Cir. 1985) (good faith and carefully tailored salary adjustment for women to rectify established past discrimination was legitimate under Equal Pay Act defense of a "factor other than sex"). Thus, whatever the particular focus in the circuits, the courts agree that the "factor other than sex" must be bona fide, a requirement which would defeat summary judgment in this case, where it remains a disputed issue of fact whether the classification system, as used in the Randolph Elementary School, has actually served to distinguish job duties, or has simply served to legitimate a difference in pay for substantially equal work performed by Mrs. Aldrich and the male custodians at the School.

III. The Second Circuit's decision is consistent with Supreme Court precedent.

In 1981, this Court made clear that the "factor other than sex" defense to the Equal Pay Act was not intended to create an all-purpose escape from the Act's provisions. *County of Washington v. Gunther*, 452 U.S. 161 (1981). The Court stated that "Equal Pay Act litigation . . . has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a *bona fide* use of 'other factors other than sex.'" *Id.* at 170 (emphasis added). *See also Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

More specifically, this Court, in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), rejected the mere articulation of a "factor other than sex" defense where Defendant-Petitioner Corning Glass Works ("Corning") had failed to prove that factor to be bona fide. Corning claimed that nighttime work justified a higher pay for male night inspectors than for female daytime inspectors. However, when men were initially hired for this inspection work, at a time when women could not legally be hired for night shift work, no other night shift workers were paid any sort of shift differential. When a shift differential was initiated plant-wide, the male night inspectors, in addition to this shift differential, continued to be paid a higher base wage than women inspectors who worked the day shift. In 1969, soon after women had begun to be hired for the night inspector position, the collective bargaining agreement was changed to eliminate the differential base wage for night and day inspectors. However, night inspectors hired prior to this time, during the period when women had been excluded from the night inspector position, continued to be paid a higher "red circle" base wage. A shift differential, the

Court concluded, therefore could not explain the higher rate paid the male night inspectors. Furthermore, the Court found that the "red circle" provision of the 1969 collective bargaining agreement, "though phrased in terms of a neutral factor other than sex, nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work." *Id.* at 209-210. Neither this facially neutral "factor other than sex," nor the mere fact of a collective bargaining agreement, could, in themselves and without being bona fide, satisfy Corning's burden of proof on the affirmative defense, just as the mere existence of a civil service system here cannot satisfy the exception. The Court also noted that fine distinctions in actual work performed, on which petitioner has sought to rely in the instant case, cannot defeat a *prima facie* claim that unequal pay is being paid men and women for "equal work" when the jobs are nevertheless *substantially* equal in nature. *Id.* at 203 n. 24 ("[I]t is . . . well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable." Certain "packing, lifting and cleaning" performed by night inspectors and not by day inspectors "was of so little consequence that the jobs remained substantially equal").

Thus, this Court has itself rejected that mere articulation of a "factor other than sex," whether or not bona fide, will suffice as a defense to the Equal Pay Act. As explained in Point II, the School has sought to hide behind the civil service classification system in this case to justify a wage differential between "custodians" and "cleaners" that is supposed to be based upon real differences in custodial and cleaning job responsibilities.

On the facts of the present case, however, no meaningful difference exists between the duties performed by Mrs. Aldrich, who remains classified as a "cleaner," and the duties performed by male co-workers classified as "custodians." Whether because cleaners have been expected to perform custodial functions without receiving the higher custodial pay, or whether because custodians have not in fact been expected to perform more than cleaning duties while receiving a higher pay consistent with performance of additional custodial functions, the classification system, at least as applied by the School, has not in fact served to differentiate between job duties and to thereby justify pay differentials. In this case, therefore, application of the civil service classification system serves absolutely no bona fide purpose and does not constitute a valid defense under the Equal Pay Act under this Court's own standard.

IV. This case does not present issues of sufficient importance to warrant the Supreme Court's review.

As noted in Point III, *supra*, this Court has itself noted that a valid "factors other than sex" defense must be bona fide. Whether the classification, at least as applied by the School in this case, is, in fact, bona fide, together with the factual question of whether Mrs. Aldrich's job functions are "substantially equal" to those of custodians, are precisely the issues for determination on remand. Both of these issues are fact-intensive inquiries, capable of determination only upon trial. The sooner these determinations can be made at trial, the sooner the full implications of the Second Circuit's decision will be clear. However, since only the School's use of the civil service classification system on the facts of this case, and not classification systems *per se* or even New York's entire civil service classification system, is the focus of the present challenge, the Second Circuit's decision, in itself, presents no important questions worthy of this Court's time and resources, despite petitioner's suggestion to the contrary.

Other school districts and municipalities that properly use the civil service classification system to distinguish between job duties, and to thereby justify differences in pay, face no risk from a decision that the Randolph Central Elementary School has misused the classification system to justify paying different wages to male and female employees who perform essentially the same work. No broad-based re-evaluation of other employers' use of the civil service classification system will be warranted unless those employers similarly pay different wages under the system without requiring different work from differently classified employees. On the other hand,

if the classification now being challenged is validated, an employer or civil service system could simply assign different job titles to men and women occupying substantially equal jobs as a pretext for sex-based wage discrimination without fear of liability under the Equal Pay Act. This would undermine the very protection intended to be provided by the Act. The issues raised by the petition are not of sufficient public importance to warrant this Court's attention or to risk compromising the efficacy of the Equal Pay Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

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